Supreme Court, U.S.
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IN THE

United States Supreme Court

2004 TERM

IVANIA M. COUTO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the trial evidence legally sufficient to support Petitioner's conviction for bribery (18 U.S.C. § 201(b)(1)(A), and conspiracy to commit bribery (18 U.S.C. § 371), where no payments were made to a government officer, or employee?

2. Did the trial court unlawfully constructively amend the indictment to alter the charges contained in the indictment, resulting in a prejudicial variance?

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OPINION BELOW

On January 14, 2005, the United States Court of Appeals for the Second Circuit issued a Summary Order affirming Petitioner's judgment of conviction (*United States v. Ivania M. Couto*, 119 Fed. Appx 345 [2d Cir. 2005]).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 29 U.S.C. § 1254(i). The Petition has been filed in a timely manner, pursuant to Rule 13(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution in pertinent part states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 201(b)(1)(A) states:

> "whoever—
>
> (1) directly or indirectly, corruptly gives, offers, or promises anything of value to any public official, or person who has been selected to be a public official . . . with intent

(A) to influence any official act . . .

shall be fined under this title . . . or imprisoned for not more than fifteen years . . ."

STATEMENT OF FACTS

A. The Government's Case

1. Operation "Wild Card"

Between April, 1999 and June, 2000, New York State investigators, together with agents from the former INS,[1] conducted undercover operation "Wild Card." The operation "utilize[ed] green cards as an object to obtain narcotics for money." During the investigation, green cards were provided to known narcotics traffickers and brokers as a commodity, paid for with narcotics.

Investigators believed that drug dealers coveted "green cards" "*because it allows individuals who otherwise could not be able to travel freely to and from their countries, in this case Colombia, and back to the United States to be able to continue working in the narcotics deals, to go their original countries to enjoy the fruits of their labor, which were the primary goals and primary targets.*" *Id.* "Green cards" allowed the drug dealers to travel and obtain other United States documents (such as Social Security cards and drivers licenses).

Drug traffickers preferred payment in narcotics rather than cash; "green cards" were valued in return for the

[1] Since March, 2003, the former INS is the "Immigration and Customs Enforcement" subdivision of the Department of Homeland Security.

drugs. For example, depending on the specific alien involved, the cards were assessed a worth of $10,000 in return for a kilo of drugs which was valued at $30,000, three cards would be issued to cover the drug price.

The officers contacted with different individuals during the investigation. They included persons who brokered drug deals; those who brokered green cards to needing persons; aliens who overstayed their visas; and "mules" solely hired to transport narcotics from New York City to the investigators' designated destination, New York's Northern District. One goal of the operation was to infiltrate these narcotics groups, and thereby determine their supply source, infrastructure, and identify their co-conspirators.

Investigator Mercado acted as a Dominican drug trafficker with connections both in New York City and Canada. Ferdinando ("Fern") Ortega worked for Mercado in the same undercover capacity. Thomas O'Connell played a corrupt INS official.[2]

Mercado was introduced to Pedro Gonzalez, a broker of both drugs and aliens desiring green cards. Gonzalez would introduce a drug supplier to a receiver (or purchaser), and from both parties. When Gonzalez saw that he could broker persons looking for the green cards which Mercado supplied, he did so.

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[2] DEA Special Agent Ulysses Delgado, who did not testify at trial (but *see United States v. Ceballos*, 340 F.3d 115 [2d Cir. 2003]), was also involved in the investigation. His role was strictly to make arrangements for delivery of narcotics from the brokers, obtain the narcotics, and negotiate prices. Mercado's job was to schedule aliens for green card processing, and set the price on the green cards that would result. Mercado would then inform Delgado of the price so that Delgado could deduct it from the value of the drugs received.

During the operation, Gonzalez contacted Mercado when he had green card customers. Gonzalez would enlist aliens, including undocumented illegal immigrants, those legal entrants with expired visas, and those who had re-entered illegally. Mercado was unaware whether Gonzalez passed himself off as an attorney in his efforts to recruit aliens with immigration problems.

In furtherance of alien "processing," Gonzalez collected the names, dates of birth, and individual passports of those he intended to transport upstate. Each alien had two photographs. This information allowed investigators to determine if any of the aliens were wanted by other agencies, and whether they had actual prior arrests, or outstanding warrants.

Mercado then contacted Gonzalez, indicating that "Maestro" (Agent O'Connell's pseudonym) was willing to meet the aliens on a particular date. Mercado told Gonzalez that:

> "Maestro, which is the named [sic] that we used for Special Agent Tom "O'Connell from the INS, was willing to meet on such and such date, at which time he [*i.e.*, Gonzalez] would provide me the names of individuals he would be bringing up that day."

Gonzalez would provide Mercado with the names of those whom the broker was intending to transport.[3]

[3] O'Connell explained that the targets ".did not have any idea of what my official position was as it relates to Immigration; they never referred to me as an agent or an officer. I was merely a corrupt person who worked for the INS." O'Connell, however, sought to make the processing itself appear "as official" as possible.

On the designated date, Gonzalez would either personally transport the aliens, or they used multiple vehicles following Gonzalez. Upon arrival, the aliens would meet with Mercado, Delgado, and other undercover individuals at the Fox Run Restaurant, located in New Baltimore, New York.

Mercado spoke with each individual whom Gonzalez had transported, advising them of "the system," and what the processing would entail. They learned they would be taken to a room at a nearby "Best Western" motel to meet "an individual," who would start processing them; taking biographical information, including examining their passports to determine their validity. Once in the room, as part of the green card processing, they would be fingerprinted by "the individual," and photographed.

In June, 1999, Mercado and Gonzalez agreed to a $5,000 per "green card" processing fee. At the time of initial processing, Mercado expected half, or $2,500. The balance would be due when the card became available. As the investigation progressed, the price increased to $7,000. By the time it ended, the price had risen to $9,500 for an alien with no prior law enforcement encounters. An alien with a prior history, paid more.

When Gonzalez delivered one group to Mercado, Gonzalez brought the passports for the next set of individuals scheduled for future processing. As new persons arrived, they received their passports "by the individual" [*i.e.*, O'Connell] who awaited their arrival. As they entered the room, he would provide the passport, and proceed to process." Pedro Gonzalez ultimately brokered about 36 greed card-seeking aliens.

On March 22nd, 2000, Mercado telephoned contacted Gonzalez, and arranged to bring up six individuals for processing. Previously, Mercado was given their names by Gonzalez, who had also delivered one kilo of heroin valued at $78,000 intended for Special Agent Delgado. Because six people were processed on that day, $29,500 was deducted as the value of six green cards, leaving Gonzalez a $48,500 balance. The undercover operatives incurred a debt that day which was lowered on April 27th when Gonzalez brought two more persons up for "green cards." By May 19th, Gonzalez was owed a $37,500 balance.[4]

Although Petitioner was not present on March 22nd, Mercado obtained background information about her from Gonzalez, who had provided her passport,[5] including her name, her date of birth, and documentation.

2. Petitioner Travels to the Northern District for Processing

The earlier debt owed to Gonzalez continued to May 19th when he brought Petitioner Ivania Couto—the mother of a 10 year-old American citizen son—to the "Fox Run

[4] Once the green card would be delivered, the "balance of processing Ms. Couto on the 19th was $11,000." *Mercado:* JA122. Such balance, however, would not cover the cost of the other five persons who were being processed that same date. Therefore, when those additional aliens would later receive their green cards, more hereon was required. *Mercado*: JA122, 154.

[5] O'Connell noted that Petitioner's visa would have expired on November 22nd, 1991. Petitioner, unlike other processed aliens, possessed a valid Social Security number, and had her passport legitimately extended in 1995 for 10 years at the Brazilian Consulate in Manhattan (until July, 2005).

Restaurant" for "green card" processing. No prior information had surfaced in Petitioner's case and, unlike many other processed people, Petitioner had absolutely no connection to the drug business.

Mercado initially met with Petitioner to insure her documents were in order. Petitioner learned that she would be meeting "an individual" inside the motel room who would be asking biographical questions, and thereafter take her fingerprints.

When asked concerning any prior encounters with law enforcement or immigration, Petitioner, who was "very relaxed," "calm," and "friendly," stated she had previously filed a petition with immigration to obtain a "green card" through marriage. After indicating the process was incomplete, Mercado noted it made "no difference," since a file would have been created. Petitioner learned that if she had any questions, she should ask the "individual" at the motel. Petitioner accompanied Ortega to the "Best Western" motel room with another person, Aracella Muñoz.

O'Connell asked whether the two women had been searched, and whether they possessed anything on their persons. He then processed them. O'Connell advised Petitioner concerning what answers to give inspectors at the airport to avoid arrest, or being subjected to another proceeding.

At the conclusion, O'Connell (as he knew of the elements of the contemplated criminal charge), asked Ortega if they were "all set with the payment." Ortega then asked Petitioner in Spanish (using the word "plata" which means "money") who, as a native Brazilian, primarily spoke Portuguese (although she is knowledgeable in both English and Spanish as second and third languages), responded "it's with Pedro."

When O'Connell therefore asked if Pedro was "taking care of it," Petitioner told O'Connell that Pedro was "taking care of it."

3. Mercado Only Discusses Payment with Pedro Gonzalez

Investigator Mercado never spoke with Petitioner about the price of the green card—only with Gonzalez. They never discussed drugs, or that Gonzalez was acquiring her green card with drugs.[6] O'Connell never took money from any aliens whom Gonzalez brought up, and certainly not from Petitioner.

Mercado told Gonzalez that the "new price" for persons with "standard problems" was $9,500. Because Petitioner had prior INS contact (and her file would consequently need to be removed), the price would be higher.

As a matter of practice, Mercado never spoke with aliens about price, because it was his understanding with Gonzalez that the broker would charge the aliens more money (whether $2,000 or $3,000), and he did not want to undercut Gonzalez's profit margin. In addition to the "green cards" being used to purchase the drugs, the aliens seeking them were likewise being used by the drug dealers as a financial source.[7]

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[6] Similarly, Mercado, who first heard later that day that Petitioner had paid Gonzalez, did not know how much she had given him. *Mercado*: JA84. In fact, he had no idea what she knew or did not know. *Mercado*: JA105.

[7] The investigators invariably placed Gonzalez in a money squeeze *vis a vis* his suppliers—including Gabriel Ceballos (*see Ceballos, supra*), to learn their identities. They had no idea, however, what Gonzalez was telling the aliens in order for him to obtain more money to pay off his drug purchase obligations.

B. The Jury Instructions and Verdict

After the Government rested, the denial of counsel's Fed.R.Cr.P. 29 motion for a judgment of acquittal, and counsel's closing arguments, the District Court, in conformity with its earlier pre-trial ruling charged the jury that:

> "[t]he defendant must have promised, offered[, or given heroin to the public official with the deliberate purpose of influencing an official act of that person." JA509.

Nonetheless, in a subsequent response to a jury question following a reported deadlock, and the giving of a duly protested *Allen* charge, Judge McAvoy charged that it was no defense that Petitioner lacked knowledge of drug activity. The jury soon returned, and convicted Petitioner on both counts.

C. The Sentencing

On March 4th, 2004, Petitioner appeared before Judge McAvoy for sentencing. The District Judge, in response to her statement, "I just want to be with my son" (SPA8), observed:

> "I still believe that you were motivated almost entirely by your desire to remain in this country and bring your son up, which you are doing an excellent job of, no question in my mind about that, and you should feel good about that. And the way this thing came down, the Court certainly understands why you did what you did. It

> wasn't right; you know that; and I believe you've accepted responsibility for that."
>
> "The Court thinks it's an unfortunate circumstance when people who clearly would make solid good citizens of the United States, are penalized because of the way our immigration laws are set up, and the Court—and I can't speak for the legislature, I can't speak for the Congress, but I can speak for myself, and I think that you certainly are the type of person we want in this country, as well as your son.

(SPA8-9, 14)."

The Court sentenced Petitioner to two concurrent five-year probationary terms, a six-month term of home detention, and a $2,500 fine, together with a $100 special assessment.

D. The Appeal

Petitioner unsuccessfully appealed to the United States Court of Appeals for the Second Circuit which, on January 14th, 2005 affirmed the judgment of conviction (*see United States v. Couto*, 119 Fed.Appx. 345 [2d Cir. 2005]).

I.

PETITIONER DID NOT BRIBE A PUBLIC OFFICIAL

Bribery under 18 U.S.C. § 201(b)(1)(A) is a specific intent crime (*United States v. Sun Diamond Growers of California*, 526 U.S. 398, 404-05 [1999]). To be convicted of bribery of a public official, therefore, the evidence must

demonstrate that the accused specifically intended that some benefit be given to such official in return for the corrupt influencing of conduct within the official's authority (*Dixon v. United States*, 465 U.S. 482, 104 S.Ct. 1172, 1176-80 [1984]) (bribery to employees of community-based social service organization administered federal program. In this regard, *"[t]he 'corrupt' intent necessary to a bribery conviction is in the nature of a quid pro quo requirement; that is, there must be 'a specific intent to give . . . something of value in exchange for an official act'"* (*Sun Diamond Growers*, 526 U.S. @ 404-05, 119 S.Ct. 1402-1406) (emphasis in original). Putting it only slightly differently, bribery involves the giving of value to procure a public official's action (*United States v. Sun Diamond Growers*, *supra*, 119 S.Ct. 1408-1410). There was no such proof attendant to payment in this case.

1. Aiding and Abetting

Under 18 U.S.C. § 2(a), anyone who:

> "aids, abets, counsels, commands, induces or procures," the commission of a crime against the United States "is punishable as a principal," with respect to that crime. As with a substantive bribery charge, aiding and abetting a principal constitutes a specific intent crime (*United States v. Samaria*, 239 F.3d 228, 234-35 [2d Cir. 2001]).

To aid and abet bribery, the Government must prove beyond a reasonable doubt that the underlying bribery, which Petitioner allegedly aided and abetted, was committed by one person other than the Petitioner, and that the Petitioner acted consciously, and with the specific purpose of accomplishing that offense (*Samaria*, *supra*; citing

United States v. Best, 219 F.3d 192, 199 [2d Cir. 2000] *cert. denied*, 532 U.S. 1007 [2001]).

Otherwise stated, "[t]o sustain a conviction for aiding and abetting, [the Court] must find that `the Petitioner joined the specific venture and shared in it, and contributed to its success'" (*United States v. Labat*, 905 F.2d 18, 23 [2d Cir. 1990]; *see also Nye & Nissen v. United States*, 336 U.S. 613, 619 [1949]; *United States v. Peoni*, 100 F.2d 401, 402 [2d Cir. 1938]; *United States v. Medina*, 32 F.3d 40, 45 [2d Cir. 1994]). "[T]he Government therefore must prove that the underlying crime was committed by someone other than the Petitioner, and that the Petitioner herself either acted, or failed to act, with the specific intent of advancing the commission of the underlying crime (*see United States v. Labat*, *supra*; *United States v. Pipola*, 83 F.3d 556, 562 [2d Cir.] *cert. denied*, 519 U.S. 869 [1996]).

[T]o show specific intent, the prosecution must prove the Petitioner knew of the proposed crime—suspicion that it might occur is not enough—and had an interest in furthering it (*see United States v. Wiley*, 846 F.2d 150, 154 [2d Cir. 1988]; *Pipola*, *supra*, 83 F.3d @ 562, *cf. United States v. Soto*, (*Peña*) 97 F.3d 546, 549-550 [2d Cir. 1995]) (Cianci used a Customs Department stamp on two occasions in Peñas presence, while leaving documents with agency's official authorization, and his own badge number). In short, a person accused of accessorial conduct must have committed some act or omission which knowingly, and intentionally, furthered the criminal end of the principal's "proposed crime." We dispute that such proof was established herein.

2. Conspiracy

Conspiracy to commit bribery, like the subject offense, is a specific intent crime (*Ceballos*, *supra*). Therefore, in furtherance of such conspiracy, the government must prove that Petitioner acted with the specific intent to violate the bribery statute. *Id.* (*Samaria*, *supra*; citing *United States v. Gaviria*, 740 F.2d 174, 183 [2d Cir. 1984]; *United States v. Wallace*, 85 F.3d 1063, 1068 [2d Cir. 1996]). This includes competent proof that Petitioner intended to corruptly influence an official act, by a known federal official (*Alfisi*, 308 F.3d @ 149).

There was no proof that Petitioner knew O'Connell was a "public official." The Panel decision went to great lengths to distinguish *United States v. Choy*, 309 F.3d 602 [9th Cir. 2002] involving money and a computer given to a private individual who, it was believed, could secure illegal customs clearance from a government official. We submit that this case is similar to *Choy*, since Gonzalez was not a federal official. There was never a "meeting of the minds" (*United States v. Rosenblatt*, 554 F.2d 36 [2d Cir. 1977]) that a federal official would be paid. We submit that, against this backdrop, there is a conflict among the Circuit Courts with respect to Section 201 prosecutions involving payments to non-officials. Whatever the ultimate outcome, this legal conflict cries out for resolution by this Court, because the same conduct which is unlawful in the Second Circuit, is valid throughout the Ninth Circuit. Like *Choy*, Couto did *not* give money to a government official. She gave it to a private person—Pedro Gonzalez—in the not unreasonable view he was a private immigration consultant.

II.

THE DISTRICT COURT CONSTRUCTIVELY AMENDED THE INDICTMENT, THEREBY EFFECTING A *PER SE* VIOLATION OF PETITIONER'S FIFTH AMENDMENT RIGHTS

Petitioner's indictment charged the 18 U.S.C. § 201(b)(1)(A) "thing of value" was "heroin delivered on March 22nd, 2000, and future heroin promised." The government conceded that Petitioner was unaware of the involvement of such drugs (*see United States v. Couto*, *supra*, 311 F.3d @ 182, n.1).

Mindful of this assumed evidentiary obstacle, Petitioner's trial counsel thereafter argued to the jury *inter alia* that there was no evidence of an agreement between Pedro Gonzalez and Petitioner involving the giving of heroin to a public official. The defense advanced this argument after being informed by the District Court's ruling, upon denying Petitioner's motion to dismiss, that "while this may affect the government's ability to prove its case to the jury, JA75a-76a, it would "still charge the jury that the 'thing of value' allegedly paid to the INS officer was heroin." *Id.*

In its later response to a jury note, and over defense objection, the District Court changed its position prejudicing the defense. For the first time, the Court concurred with the government's circumvention of the indictment—on the heels of having given a protested *Allen* charge to a deadlocked jury—by instructing that it was no defense to the bribery "that the Petitioner had no knowledge of the specific thing of value that was actually given, offered, or promised to the public official by someone on her behalf." JA558.

This dramatic judicial alteration went to the very "core of criminality to be proven at trial" (*United States v. Wozniak*, supra, 126 F.3d @ 109). It constructively amended the indictment which the Grand Jury had earlier returned. As a result, there was a *per se* violation of the Fifth Amendment, and Petitioner should be afforded a new trial.

It has been "black letter law," at least since *Ex Parte Bain*, 121 U.S. 1, 7 S.Ct. 781 [1887] that, after an indictment has been returned, its charges may not be broadened by amendment, except by Grand Jury action. In a consistent line of cases, including *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270-272-74 [1960], this Court has hewed to this view of the Fifth Amendment.

More recently, in *Schmuck v. United States*, 489 U.S. 705, 717-18, 109 S.Ct. 1443, 1451 [1989], this Court reaffirmed its lack of tolerance for variances which erode the accused's notice of the filed charges. The variance here involved "heroin delivered and future heroin promises." Where, as here, the governments conceded Petitioner's lack of knowledge of such drugs, the charge effected by Judge McAvoy was effectuated with the deft skill of a "three-car Monti" dealer.

The criminal justice system requires more. This Court should grant review to revisit *Stirone*, and re-affirm the constitutional error in prejudicial variances of this kind.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals for the second circuit vacated, and the case remanded for appellate review consistent with this court's ruling.

Dated: New York, New York
April 12, 2005

Respectfully submitted:

/s/ ROGER BENNET ADLER

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APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

No. 04-1516-CR
January 14, 2005

UNITED STATES of America,

Appellee,

v.

Ivania M. COUTO,

Defendant-Appellant.

UPON DUE CONSIDERATION of this appeal from the United States District Court for the Northern District of New York (McAvoy, J.), it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Mark M. Baker, Brafman & Ross, P.C. (Benjamin Brafman), New York, New York, for Appellant, *of counsel*.

Richard S. Hartunian, Assistant United States Attorney for the Northern District of New York (Glenn T. Suddaby, United States Attorney for the Northern District of New York, *on the brief*; Robert P. Storch, Senior Litigation Counsel), for Appellee, Albany, NY, *of counsel*.

Present: WINTER, SOTOMAYOR, and B.D. PARKER, Circuit Judges.

ORDER

Defendant Ivania M. Couto appeals from a judgment of the United States District Court for the Northern District of New York (McAvoy, J.) after conviction for conspiring to commit and committing bribery in violation of 18 U.S.C. §§ 371, 201(b)(1)(A), and 2. Couto was principally sentenced to five years of probation with six months of home detention. For the reasons to be discussed, we reject Couto's challenges to her conviction. We also assume familiarity by the parties with the facts and procedural history of the case.

The federal bribery statute, codified in relevant part at 18 U.S.C. § 201(b)(1)(A), imposes criminal penalties on anyone who "directly or indirectly, corruptly gives, offers or promises anything of value to any public official or any person who has been selected to be a public official, or offers or promises any public official or any person who has been

selected to be a public official to give anything of value to any other person or entity" with intent "to influence any official act." Couto argues that the evidence only established that she paid money to Pedro Gonzalez, a private broker who trafficked in drugs and illegal green cards, so that Gonzalez would secure a green card for her. According to Couto, this evidence was insufficient to establish her intent that a "thing of value" be given to a "public official," within the meaning of § 201(b)(1)(A), in exchange for an illegal green card. We disagree.

A jury's verdict must be upheld if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). At the end of the illicit transaction during which Couto secured her false immigration papers, the individual processing her paperwork (Thomas O'Connell, an undercover law enforcement official posing as a corrupt immigration official) asked Couto if the payment for illegal immigration documents had been settled. In response, she stated that the funds for the transaction were with "Pedro" and affirmatively indicate that Gonzalez would resolve the payment. This exchange was more than sufficient for the jury to reject Couto's assertion that Gonzalez was the only intended recipient of her funds.

Couto also asserts that insufficient evidence existed to support her knowledge that O'Connell was a public official. During his transaction with Couto, however, O'Connell indicated to her that he had access to the federal government's immigration files; described regional immigration processing centers as "our local offices"; repeatedly referred to the government's computing setup for immigration matters as "our" system; stated that he possessed an "approval stamp" that would allow Couto to circumvent questioning by immigration

officials; coached Couto on methods for evading detection by immigration authorities; and conversed in immigration terminology and about immigration procedures. A rational trier of fact could have found that this evidence established Couto's knowledge that O'Connell was a corrupt immigration employee. *Cf. United States v. Jennings*, 471 F.2d 1310, 1312-13 (2d Cir. 1973) (holding that conviction under federal bribery statute does not require proof that defendant knew of bribed official's federal status but only proof that defendant has "some form of knowledge that the person bribed was *an official*."). Couto's reliance on *United States v. Choy*, 309 F.3d 602 (9th Cir. 2002) is unpersuasive. In *Choy*, the Ninth Circuit declined to uphold the bribery conviction of an individual who gave money and a computer to a private individual who, in turn, agreed to secure illegal customs clearances from a government official. 309 F.3d at 604, 606. Because the defendant gave nothing directly to the government official, but merely facilitated the private intermediary's ability to obtain the illicit customs approvals, the court found that the defendant's acts did not fall within the terms of the bribery statute. *Id.* at 606. The *Choy* defendant only met with the government official to discuss the customs clearance plan, not to offer him an item of value in exchange for his assistance in securing false customs approvals. *Id.* at 604, 605. The instant case is readily distinguishable, for the evidence establishes that Couto intended for an item of value to be given directly to an individual she had every she had every reason to perceive to be a public official in exchange for his commission of a crime on her behalf.

Couto next argues that the district court's jury instruction constructively amended the indictment. The Fifth Amendment establishes a defendant's right to be tried only on charges contained in a grand jury indictment. *United*

States v. Clemente, 22 F.3d 477, 482 (2d Cir. 1994). "A constructive amendment occurs when the government's presentation of evidence and the district court's jury instructions combine to modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury." *United States v. Vebeliunas*, 76 F.3d 1283, 1290 (2d Cir. 1996) (citation and internal quotation marks omitted). This Court has established that "not every variance between the words of the indictment and the evidence presented at trial or the instructions given to the jury amounts to a constructive amendment," *United States v. Ansaldi*, 372 F.3d 118, 127 (2d Cir. 2004). Rather, "an impermissible alteration of the charge must affect an essential element of the offense." *United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992). A constructive amendment is a *per se* violation of the Fifth Amendment that requires reversal regardless of whether the constructive amendment actually prejudiced the defendant. *Clemente*, 22 F.3d at 482.

During the course of its deliberations, the jury asked the district court, *inter alia*, if it was a defense to the crime of bribery that the defendant had no knowledge of the specific thing of value (in the instant case, heroin) that was actually given, offered or promised to the public official by someone else on her behalf. The district court responded that this was not a defense. Couto argues that this instruction constructively amended the indictment.

This argument lacks merit. The indictment stated in relevant part that the named defendants, including Couto, "directly or indirectly did corruptly give, offer and promise a thing of value as set forth below, to an employee of the United States Department of Justice, Immigration and

Naturalization Service (INS), a public official, with the intent to influence an official act . . ." Count Eighteen of the indictment identified that thing of value as "[h]eroin delivered on March 22, 2000 and future heroin promised." Similarly, the conspiracy charge in the indictment stated that the thing of value was "[h]eroin promised." The indictment did not specify that Couto directly delivered, gave or promised heroin. The government stipulated at trial to the fact that Couto had no knowledge that Gonzalez delivered heroin in exchange for her illegal green card. Throughout the trial proceedings, the government repeatedly stated that its theory of the case never necessitated proof of Couto's knowledge that heroin was exchanged for the illegal green card but only required proof that Couto offered "something of value" to influence a public official.

Couto has not established that the contested jury charge varied from the indictment of the government's position at trial such that she was convicted for a crime for which she was not charged. Nor does Couto show that the government introduced evidence that could have permitted the jury to convict her on grounds different from those set forth in the indictment. The jury charge also did not require proof of Couto's knowledge that heroin would be given to O'Connell. Accordingly, Couto's case is readily *distinguishable from those in which we have found constructive amendment. See, e.g., United States v. Wozniak*, 126 F.3d 105, 108-11 (2d Cir. 1977) (holding that constructive amendment occurred when indictment charged defendant with cocaine and methamphetamine offenses but government's evidence consisted primarily of marijuana evidence and district court charged jury that it could convict regardless of illegal substance involved); *United States v. Zingaro*, 858 F.2d 94, 102-103 (2d Cir. 1988)

(finding that constructive amendment occurred because government introduced evidence of extortionate act that did not form basis of indictment).

For the reasons discussed, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: _____